BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EPITACIO VASQUEZ Claimant	)	
VS.	)	
RESER'S FINE FOODS, INC. Respondent	)	Docket No. 1,037,685
AND	)	
WAUSAU UNDERWRITERS INS. CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the December 20, 2010, Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on March 23, 2011. George H. Pearson, of Topeka, Kansas, appeared for claimant. James W. Fletcher, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant had a functional impairment of 50 percent to the left lower extremity for the left knee and 15 percent to the body as a whole for the back injury. Further, the ALJ found that claimant was permanently and totally disabled. Future medical treatment would be considered upon application.

The Board has considered the record and adopted the stipulations listed in the Award. The Board has also considered the independent medical examination report of Dr. Terrence Pratt dated July 9, 2009, and filed with the Division on July 16, 2009. During oral argument to the Board, the parties agreed that the pre-injury gross average weekly wage was $508.59 and the compensation rate was $339.08. As such, there was an under-payment of temporary total disability benefits.

ISSUES

Respondent requests review of the ALJ's finding that claimant was permanently and totally disabled. Respondent argues that claimant did not have an amputation or permanent loss of use of a scheduled member; that benefits under K.S.A. 44-510d are limited to those provided for in the schedule found at K.S.A. 44-510d(a), unless there is a complete loss of or total loss of use of two specific scheduled members; and that claimant's inability to work was not caused by the work-related injury. Respondent further asks the Board to find that claimant is not entitled to future medical because there was insufficient evidence of causation linking the last injury and the award of permanent total disability. Respondent also denies that claimant's back injury is work related. It is respondent's contention that claimant's permanent disability award should be limited to a 50 percent impairment of the left knee (50 percent scheduled injury to the leg).

Claimant argues that he is permanently, totally disabled and the Award of the ALJ should be affirmed.

The issues for the Board's review are:

(1) What is the nature and extent of claimant's injury and disability? Is claimant permanently, totally disabled?

(2) Is claimant entitled to future medical?

FINDINGS OF FACT

Claimant immigrated from Mexico in 1988. He only went up to the 5th grade in school. He does not read, write or speak English. Since he immigrated, he has worked only manual, physical labor jobs. He does not have a driver's license. At the time of the accident in July 2006, he was 59 years old.

Claimant worked for respondent in maintenance. On July 3, 2006, he fell, landing on his left knee. He was taken to the emergency room and was then referred to Dr. Michael Montgomery. Claimant continued to work for respondent, but at some point was placed in an accommodated position where he was able to sit on a stool while sorting potatoes to accommodate his restriction of only working a sedentary job with a 10-pound weight restriction. Claimant testified, however, that because of pain in his legs, he was unable to perform the accommodated job, and he left his employment on October 6, 2007. He received a telephone call a couple of days later from respondent asking if he was going to return to work, and he said he could not work because of his pain. Claimant said he was placed on family medical leave.

Claimant testified that he had been scheduled for a total knee replacement for October 9, 2007, but the surgery was denied by respondent and was cancelled. On or

about December 4, 2007, claimant received a letter from respondent indicating he needed to return to work on February 13, 2008, with no restrictions, or he would be terminated. Because he could no longer take the pain, claimant scheduled the knee replacement surgery with Dr. Michael Montgomery, and it was performed on January 22, 2008.[1] Claimant's intention was to heal and then return to work. But claimant was unable to return to work by February 13, and he was subsequently terminated.

Claimant testified that after his left knee replacement surgery, he had physical therapy. When he started walking without using assistive devices, he began to develop problems with his right leg, his left hip, and his mid to lower back. He walks with a limp favoring his left leg. Claimant testified that his left knee has improved, but he still has some pain. He has pain in his back which increases with walking.

Claimant had surgery on his right knee back in the late 1980s, shortly after he immigrated to the United States from Mexico. He was told he was back to 100 percent after the surgery. Also, in November 2004, claimant fell while working for respondent and fractured his left kneecap. He did not require surgery for that injury, but he did have some physical therapy. Claimant said that although he still had some popping in his left knee, he was able to return to his regular job after the 2004 injury.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant on January 2, 2008, and February 2, 2009, both times at the request of claimant's attorney. Claimant gave Dr. Prostic a history of both his 2004 and 2006 left knee injuries. He told Dr. Prostic that he did not make a complete recovery from the 2004 left knee injury. Upon examination in January 2008, Dr. Prostic found that claimant walked with a significant limp favoring his left leg. Claimant was bowlegged and had crepitus in his left knee. He was unable to walk on his left heel and walked poorly on the left forefoot. He squatted poorly. After the examination, Dr. Prostic recommended that claimant have a total knee replacement because he had limited motion in his knee with abnormal alignment and complete loss of medial compartment articular cartilage.

Dr. Prostic again saw claimant on February 2, 2009. He reviewed additional medical records, including those of Dr. Montgomery indicating claimant had a total left knee replacement on January 22, 2008. Dr. Prostic opined that claimant's left knee was at maximum medical improvement (MMI) at that time, although he also noted that claimant had a poor result to the total knee replacement arthroplasty.[2] Dr. Prostic also commented that claimant had symptoms that were highly suspicious for lumbar spinal stenosis. Dr.

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[1] During oral argument to the Board, counsel for respondent said that the workers compensation insurance carrier paid for claimant's knee replacement surgery as an authorized medical expense.

[2] In Dr. Prostic's report of February 2, 2009, he stated that claimant had a poor result from the total knee replacement. In his deposition testimony, however, Dr. Prostic said claimant had a moderate result. His impairment rating is based on a moderate result from the knee replacement.

Prostic said stenosis can be caused or aggravated by trauma or an altered gait. And as spinal stenosis is a progressive condition, it is not unreasonable that the emergence of symptoms would have been delayed rather than present early on after the accident. It is his opinion that the impairment in claimant's lumbar spine is directly attributable to the altered gait from the injury of July 3, 2006.

Based on the AMA *Guides*,[3] Dr. Prostic rated claimant as having a 50 percent permanent partial impairment to the left lower extremity for his moderate result from total knee replacement. In addition, Dr. Prostic said claimant had an additional 10 percent impairment of the left lower extremity for persistent edema. Dr. Prostic also opined that claimant had permanent impairment to the body as a whole for his lumbar spine. He said that assuming claimant had no medical treatment for his lumbar spine subsequent to February 2, 2009, his opinion would be that claimant had a 15 percent impairment of function to the whole body under the AMA *Guides*.

Dr. Prostic said that claimant was capable of only sedentary employment with the ability to change positions as needed, meaning claimant should predominantly sit down with a 10-pound lifting restriction. Dr. Prostic said he felt the restrictions were necessary because claimant had limited standing and walking tolerance because of his leg and low back.

Dr. Prostic opined that claimant is realistically not employable because of his inability to speak English, his poor mobility, and, he assumed, lack of skills other than manual and physical labor. But if claimant were to have the position at respondent sorting potatoes, if he was sitting in a quiet area while sorting potatoes and if he was sitting and standing at his leisure, Dr. Prostic said claimant could do that job. If, however, claimant worked a production line, and especially if he was doing repetitious twisting or bending, Dr. Prostic did not think claimant would be able to continue that work.

Claimant was examined by Dr. Terrence Pratt on July 9, 2009, at the request of the ALJ. Claimant told him he fell on his left knee on July 3, 2006. He had physical therapy and then, in January 2008, had knee replacement surgery. Claimant told Dr. Pratt that after the surgery, he initially ambulated with a walker, followed by a cane. He said he developed low to upper back discomfort when he started to walk without assistive devices. In December 2008, he was released from medical treatment, at which time he was not having any significant knee discomfort. But in approximately April to May 2009, the symptoms returned without a specific triggering event.

Claimant described his left knee pain as intermittent pulsations. He also has numbness with range of motion, popping with ambulation, and feels that the knee is

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

intermittently cold. The symptoms are worse after walking for one hour and with hills. His back pain is intermittent, starting in the low back and radiating to the upper back with the sensation of muscle cramping. He did not describe any true radicular-type symptoms other than into the bilateral gluteal regions.

After reviewing claimant's medical records and performing a physical examination, Dr. Pratt diagnosed claimant with a history of degenerative joint disease, left knee, status post total knee arthroplasty; thoracic and lumbosacral discomfort with a history of degenerative disc disease; and a history of peripheral edema of the bilateral lower extremities. He did not think that claimant had achieved MMI because of the increase in the symptoms in his left knee.

Dr. Pratt related claimant's left knee symptoms to his preexisting degenerative condition and his work-related injury in 2006, which resulted in aggravation of the underlying degenerative changes. Dr. Pratt did not relate claimant's lower and mid-back complaints to the 2006 accident, stating that the treatment records for his left knee do not contain indications of back problems, and especially because of the reports of degenerative changes in the low thoracic to lumbosacral region. Dr. Pratt said that although an altered gait can result in aggravation of underlying involvement in the lumbosacral area, that would be expected during his recovery from the knee and not late in the process. Dr. Pratt agreed that claimant's activities should be limited to a sedentary level until further assessment.

Bud Langston, a vocational consultant, met with claimant on April 23, 2010, at the request of claimant's attorney. An interpreter was present. As reflected in the medical records, claimant was restricted to sedentary work, which Mr. Langston identified as performing a job in a seated position, and the weights handled would be 10 pounds occasional as a maximum, and 5 pounds more frequently or continuously.

Mr. Langston opined that claimant's current restrictions would take claimant out of the labor market. Also, considering claimant's level of employment, age, education and lack of English-speaking ability, he has been realistically removed from the job market. Mr. Langston still did not think claimant would be able to find a sedentary, unskilled job, even if he could speak English.

Mr. Langston said that if claimant's accommodated job of sitting on a stool sorting potatoes did not require him to get up and be on his legs for a period of time, then he would say that job could be within claimant's restrictions. However, claimant told Mr. Langston that even with accommodations, he was unable to perform that job, and Mr. Langston said he would have to know more about the job before he could render an opinion on whether it would fit within claimant's work restrictions.

Steven Benjamin, a vocational rehabilitation consultant, met with claimant on September 8, 2010, at the request of respondent. Claimant was not able to communicate

without his interpreter. Mr. Benjamin said that claimant told him he worked in a maintenance position at respondent and then was moved to a sorting or packaging type position for 8 or 9 months. The only information Mr. Benjamin had about that job was from testimony at the regular hearing. Based on the information from the regular hearing transcript, Mr. Benjamin thought the sorting job would be within claimant's restrictions.

Claimant told Mr. Benjamin that he has not looked for work since he left his employment at respondent. Claimant has not registered with the local Work Force Development Center. Claimant said he had applied for unemployment benefits but was denied. Claimant had applied for and received Social Security disability benefits.

Mr. Benjamin opined that claimant should be able to return to the open labor market and be able to hold substantial and gainful employment. In doing so, Mr. Benjamin looked at claimant's past work, age, education, and communication issues. He also looked at claimant's transferable skills and restrictions. Mr. Benjamin noted that claimant is limited to sedentary work and because of his communication issues and his work history, he would be limited to sedentary unskilled work. Mr. Benjamin said that although claimant is limited in his vocational options, there should be some positions available for him if he wanted to return to work similar to the accommodated job he had at respondent.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[4] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[5] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[6]

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[4] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[5] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[6] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510d(a) states in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

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(16) For the loss of a leg, 200 weeks.

. . . .

(18) Amputation or severance below the wrist shall be considered as the loss of a hand. Amputation at the wrist and below the elbow shall be considered as the loss of the forearm. Amputation at or above the elbow shall be considered loss of the arm. Amputation below the ankle shall be considered loss of the foot. Amputation at the ankle and below the knee shall be considered as loss of the lower leg. Amputation at or above the knee shall be considered as loss of the leg.

. . . .

(21) Permanent loss of the use of a finger, thumb, hand, shoulder, arm, forearm, toe, foot, leg or lower leg or the permanent loss of the sight of an eye or

> the hearing of an ear, shall be equivalent to the loss thereof. For the permanent partial loss of the use of a finger, thumb, hand, shoulder, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, compensation shall be paid as provided for in K.S.A. 44-510c and amendments thereto, per week during that proportion of the number of weeks in the foregoing schedule provided for the loss of such finger, thumb, hand, shoulder, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, which partial loss thereof bears to the total loss of a finger, thumb, hand, shoulder, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear; but in no event shall the compensation payable hereunder for such partial loss exceed the compensation payable under the schedule for the total loss of such finger, thumb, hand, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, exclusive of the healing period. As used in this paragraph (21), "shoulder" means the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures.
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> (23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

In *Casco*,[7] the Kansas Supreme Court stated:

> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.

It is significant to note that in *Casco*, the court found the presumption applied despite the claimant having suffered only a partial loss of use of his bilateral upper extremities.

K.S.A. 44-510c states in part:

> (a) (2) Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all

[7] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 8, 154 P.3d 494 (2007).

> other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[8]

In *Wardlow*[9], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The court in *Wardlow* looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

ANALYSIS

The knee injury and surgery resulted directly from claimant's fall at work on July 3, 2006. The back injury and impairment occurred as a direct and natural consequence of that knee injury and the resulting altered gait.

The ALJ found the functional impairment ratings given by Dr. Prostic to be persuasive and adopted those percentages in the Award. The Board agrees with the ALJ in this regard. However, Dr. Prostic rated claimant's left lower extremity at 50 percent for a moderate result from the total knee replacement and, in addition, rated the persistent edema at 10 percent. These two impairments combine to a 55 percent left lower extremity impairment using the Combined Values Chart in the AMA *Guides*. The Board likewise adopts Dr. Prostic's 15 percent whole body rating for the lumbar spine impairment.

The Kansas Supreme Court has held that if the injury is both to a scheduled member and to a nonscheduled portion of the body, the disabilities should be combined and compensation should be awarded under K.S.A. 44-510e.[10] Dr. Prostic did not say

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[8] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[9] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[10] *Bryant v. Excel Corp.*, 239 Kan. 688, 689, 722 P.2d 579 (1986). See also *Goodell v. Tyson Fresh Meats*, 43 Kan. App. 2d 717, 235 P.3d 484 (2009); *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

what the total whole body percentage of impairment would be when the lower extremity rating is converted to a percentage to the body as a whole and then added to the percentage of impairment to the back. There is nothing in this record that shows what that combined whole body percentage would be. But it is not necessary to have that percentage in order to calculate the award because of the Board's ultimate determination herein that claimant is permanently totally disabled.

Dr. Prostic recommended sedentary employment with the ability to change positions as needed and a 10 pound maximum lifting limitation. When these work restrictions are factored together with claimant's limited education, his work experience being primarily physical manual labor jobs, and his inability to speak, read or write in English, claimant is rendered realistically unemployable in the open labor market.

Claimant has not requested additional medical treatment at this time. Pursuant to K.S.A. 44-510k, claimant may apply to the Director for medical treatment in the future.

CONCLUSION

(1) As a result of the work-related accident, claimant has a 55 percent impairment of function to his leg and a 15 percent impairment of function to his back. He is permanently and totally disabled from engaging in substantial gainful employment.

(2) Claimant is awarded future medical treatment upon application to and approval of the Director.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated December 20, 2010, is modified as to the percentage of the functional impairment to the leg but is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2011.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
James W. Fletcher, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge